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IN THE

# SUPREME COURT OF THE UNITED STATES

WILLIAM HOYET REDMOND and DOROTHY LUCILLE REDMOND,
Petitioners,
VS.
UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

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**IN THE SUPREME COURT OF THE UNITED STATES**

**No._____**

WILLIAM HOYET REDMOND and
DOROTHY LUCILLE REDMOND,

Petitioner

VS.

UNITED STATES OF AMERICA

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:**

The petitioners, William Hoyet Redmond and Dorothy Lucille Redmond, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Cause No. 16,298 of that Court on January 26, 1966.

## OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition.

## STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Tennessee, Nashville Division, entered judgments of conviction against the Petitioners on November 6, 1964, on charges of causing obscene materials to be delivered through the mails, in violation of 18 U.S.C. 1461 (4a). The United States Court of Appeals for the Sixth Circuit affirmed these judgments of conviction on January 26, 1966.

Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U.S.C. §1254 (1).

## QUESTIONS PRESENTED

1. Is a person who orders and receives obscene material through the mail, for personal use, guilty of the crime of "causing" the material to be mailed, within the meaning of 18 U.S.C. 1461?

2. Is the conviction and imprisonment of such a person violative of the right of freedom of speech guaranteed him by the First Amendment to the United States Constitution?

## STATUTES INVOLVED

§1461. *Mailing obscene or crime-inciting matter.*

"Every obscene, lewd, lascivious, or filthy book,

pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character;

. . . . . .

is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be non-mailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both, for each such offense thereafter."

## STATEMENT OF THE CASE

The Petitioners, William Hoyet Redmond and wife, Dorothy Lucille Redmond, were charged with violating the Federal Mail Obscenity Statute, 18 U.S.C. 1461 (4a). They waived indictment and jury trial, and were tried on information before the District Court for the Middle District of Tennessee, on October 15, 1964. The Court found them guilty, and by judgment entered on November 6, 1964, sentenced William Hoyet Redmond to a term of nine months imprisonment, and Dorothy Lucille Redmond to a term of six months imprisonment (12a-14a).

The Petitioners were convicted, in effect, of mail-

ing obscene material to themselves. The stipulated facts reveal that they took nude pictures of one another, in the privacy of their home, sometime during March, 1964. Having no means of developing the film, they sent it to an address in Havelock, North Carolina, to be developed. The developed pictures were returned to the Petitioners on or about April 4, 1964 (6a).

The Government asserted, and the District Court held, that this *return* mailing of the developed pictures, from North Carolina to the Petitioners, was a violation of Section 1461 *by the Petitioners.* The Court held that by ordering and subsequently receiving the developed pictures, the Petitioners violated that portion of Section 1461 which prohibits the mailing of obscene materials, or causing them to be mailed (11a). The Petitioners were not charged with or convicted of, violating that portion of Section 1461 which prohibits the receiving of obscene material for the purpose of further circulating it, there being no evidence that they intended to further circulate the pictures in question.

The Sixth Circuit Court of Appeals affirmed the convictions in a *per curiam* opinion which adopted the opinion of the trial court without comment.

## REASONS FOR GRANTING THE WRIT

1. *Potential impact of the decision.*

No court has ever previously suggested that the receipt of obscenity for personal use is a Federal crime under the mail obscenity statute. The issue has not, in fact, been raised during the 94 years this statute has been in force. Until the present decision, the universal assumption seems to have been that the mail obscenity statute, like other obscenity laws, is directed

solely at those engaged in the dissemination of obscenity to others.[1] This Court seems to have shared this assumption.[2]

Since recipients of commercial obscenity obviously outnumber disseminators many times over, the potential quantitative impact of the present decision is enormous. For every disseminator now being investigated or prosecuted within the jurisdiction of the Sixth Circuit Court, there must be hundreds of private recipients who are now, in accordance with this decision, subject to equivalent prosecution and punishment. Whether other United States Attorneys will choose to prosecute is beside the point. The point is that an enormously far-reaching precedent has been established.

2. *Radical nature of the decision.*

The present decision is, in a literal sense, *sui*

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[1] "There is, however, involved in the thing condemned the thought of something published, and this element is lacking in a writing by a person to himself." *United States v. Reinheimer*, 233 Fed. 545 (E.D. Pa., 1916) at 547

C.F., *Senate Report No. 113*, March 16, 1955, *U. S. Code Congressional and Administrative News*, page 2211 ("Section 1461 of the criminal code was enacted to prevent the mails from being used to corrupt public morals"); *United States v. Roth*, 237 F. 2d 796, 802 (2d Cir. 1956) (Separate opinion of Frank, J.) (The federal obscenity statute, as judicially interpreted, inflicts punishment "for provoking . . . undesirable sexual thoughts, feelings or desires"); *Walker v. Popenoe*, 149 F. 2d 511 (D.C. Cir. 1945) ("This statute . . . assumes that the stimulation of the senses by writing or printing is an evil"); *Lockhart and McClure, Obscenity in the Courts*, 20 *Law and Contemp. Prob.* 587, 590 (1955); Schmitt, *A Justification of Statutes Barring Pornography*, 26 Ford. L. Rev. 70, 83, 84 (1957).

[2] *Roth v. United States*, 354 U.S. 476 (1957) in which the mail obscenity statute is consistently referred to as a statute designed to punish the *dissemination* of obscenity.

*generis*. It represents, not only an unprecedented interpretation of 18 U.S.C. 1461, but also a complete departure from the historical theory and practice of Anglo-American criminal obscenity laws. If there is a single precedent in this Country or in England for convicting a private recipient under an obscenity law, diligent research has failed to disclose it.

The common law roots of obscenity legislation are found in the crime of obscene libel, which was first recognized, in England, in 1727[3]. Obscene libel is a species of criminal libel, and like all criminal libel, it requires a publication of the obnoxious material from the defendant to some other person. The criminal act is publication, and only the publisher is subject to prosecution.[4] Thus, it is legally impossible at common law to reach the bizarre result which was reached in this case: that is, the conviction of a person for obtaining and exposing *himself* to obscenity.

Obscenity legislation has followed the common law pattern. England has enacted a comprehensive obscenity statute which, in effect, codifies the common law of obscene libel. It makes publication of the obscenity by the defendant to some other person an essential element of the offense.[5] In this Country, State obscenity laws are likewise aimed at disseminators, and define the prohibited activity in terms of various forms of dissemination.[6] The conduct of the present

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[3] *Curl's Case*, 2 Stra. 788 (1727).

[4] *Swindle v. State*, 10 Tenn. 581 (1831). See, generally, Williams, *Obscenity in Modern English Law*, 20 Law and Contemp. Prob. 630, 631 (1955).

[5] *Williams*, supra, n. 4.

[6] E.g. Alaska Statutes, §11.401.60 (1964); Kentucky Revised Statutes, §436-100 (3rd Ed. 1963); Iowa Code Annotated, §725.4 (1946); Pennsylvania Statutes Annotated, 18-4524; Tennessee Code Annotated, 39-3001.

defendants did not, for example, violate the obscenity laws of Tennessee, the State in which it occurred.[7]

In short, the present decision is without any apparent historical foundation, and apparently cannot be supported by analogy to any existing law: American or English, State or Federal, statutory or common law. Right or wrong, such a decision surely requires review by this Honorable Court.

3. *The decision is confusing, in light of the statutory language, and its scope and rationale are unclear.*

The Sixth Circuit's interpretation of the mail obscenity statute is particularly abrupt and confusing, because the language of the statute, and its predecessors, gives no indication that Congress intended to delete the requirement of publication or dissemination as an essential element of the offense. The statutory language, in fact, indicates the contrary. From its inception, the statute has defined the prohibited activity in terms of dissemination. In its original form, it merely prohibited the "depositing" of obscenity in the mails. 17 Stat. 302, Ch. 335, §148, 42nd Cong. 2d Sess. (1872). The following year, the statute was extended to include, in addition, the receipt of obscenity, "in pursuance of a scheme" for "disposing" of it. 17 Stat. 599, Ch. 258, §2, 42nd Cong. 3d Sess. (1873). Thus, recipients were made punishable, but only to the extent that they themselves were actual or potential disseminators.

[7] The Tennessee obscenity statute is as follows:

"If any person print, publish, import, sell or distribute [obscene publications], or introduce the same into any family, school or place of education, or have the same in his possession for the purpose of loan, sale, exhibition or circulation, or with the intent to introduce the same into any family, school or place of education, he shall be guilty of a misdemeanor." Tennessee Code Annotated, 39-3001.

The next relevant change occurred in 1958, when the phrase "whoever deposits in the mails" was superceded by the phrase "whoever causes to be delivered by mail." The purpose of this amendment was not to make recipients of obscenity punishable, but to make disseminators punishable at the point of receipt, as well as at the point of mailing. See Senate Report No. 1839, *United States Congressional Code and Administrative News*, p. 4012, (July 15, 1958).

There have been no relevant changes in the Act since 1958. In its present form, it makes punishable: (1) Those who cause the delivery of obscene materials, and (2) those who receive obscene materials, "for the purpose of further circulating or disposing of it." The Sixth Circuit's interpretation of the former provision, as including recipients, renders the latter provision unintelligible. If those who order and receive obscenity are punishable on the theory that they "cause" its mailing, there is obviously no need for a more restrictive provision making recipients punishable only when they intend to "further circulate or dispose of" the material.

The present decision is, therefore, illogical and confusing, as well as being unprecedented. Even if it were a correct decision, its rationale and limitations would desperately need clarification. Such clarification must, necessarily, be provided by this Court, since the lower courts have provided none.

4. *Constitutional implications of the decision.*

Grave doubts have been raised regarding the validity of obscenity laws, even as applied to commercial disseminators of hard core pornography.[8] This Court

[8] See the dissenting opinion of Justices Black and Douglas in *Roth v. United States*, 354 U.S. 476 (1951); and the concurring opinion of Judge Frank in *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1956).

has sanctioned the prosecution of such commercial predators, but has refused to give obscenity laws any broader sanction.[9] Whatever limitations are ultimately imposed upon obscenity laws, surely the conviction and imprisonment of a husband and wife for obtaining and "exposing themselves" to pictures of themselves is far, far beyond the Constitutional pale. Such convictions, and the precedent they have generated, should not pass unnoticed by this Court.

## CONCLUSION

Petitioners pray that they be granted a review of their convictions on writ of certiorari; that the said convictions be reversed; and that the petitioners be discharged.

Respectfully submitted,
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214 Union Street
Nashville, Tennessee

[9] "The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Government can constitutionally punish such conduct. That is all these cases present to us, and that is all that we need to decide." *Roth v. United States*, 354 U.S. 476, 495, 496 (1957) Cf. Model Penal Code §207.10 which provides for punishment of commercial exploiters of obscenity only.

No. 16298

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
WILLIAM HOYET REDMOND
and
DOROTHY LUCILLE REDMOND
*Defendants-Appellants.*

ON APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

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Decided January 26, 196(

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Before PHILLIPS, Circuit Judge, MCALLISTER, Senior Circuit Judge, and BROOKS, District Judge.*

PER CURIAM. Appellants were charged with violating 18 U.S.C. § 1461, the federal mail obscenity statute. They waived indictment and jury trial and were tried on information before District Judge William E. Miller, who found them guilty and sentenced Mr. Redmond to a term of nine months' imprisonment and Mrs. Redmond to a term of six months.

We affirm both convictions upon the findings of fact and conclusions of law of the district judge, which are as follows:

"Findings of Fact

"The Court finds the facts of the case to be in accordance with the stipulation entered into between the parties, as follows:

---

* Honorable Henry L. Brooks, United States District Judge for the Western District of Kentucky, sitting by designation.

"1. Early in March 1964, the defendant William Hoyet Redmond saw an advertisement in a magazine advertising a club which operated under the name of 'Identification' as being a correspondence club for broadminded persons. The defendant William Hoyet Redmond thereupon instructed and caused his wife, Dorothy Lucille Redmond, to write a letter in response to the advertisement to Identification, P.O. Box 153, Havelock, North Carolina, to find out the details of the services offered by the said correspondence club. In reply to the said letter, Mr. and Mrs. Redmond received the letter postmarked March 8, 1964, indicating that the said club offered various services including contact with other broadminded couples and the developing of confidential photographs; that the membership fee for joining the said club was $1.00 per person for a year's membership and that the charge to members for the developing and printing of such confidential negatives was $2.00 per roll of negatives.

"2. Shortly thereafter, the defendants took nude photographs of each other. Thereupon the defendants William Hoyet Redmond, caused his wife, the defendant Dorothy Lucille Redmond, to write a letter to Identification, P. O. Box 153, Havelock, North Carolina, enclosing the roll of exposed but undeveloped photographic film of the said Mr. and Mrs. Redmond. With this letter, the defendants mailed to the said address of 'Identification' a roll of 620 mm film with $4.00 cash for membership fees and for developing and printing of the roll of negatives.

"3. The operators of Identification, who cor-

responded under the names of Ken and Peg Hallbeck, developed and printed the said negatives which had been sent to them by the defendants Redmond. They then mailed the developed negatives with eleven prints in an envelope addressed to Mr. and Mrs. Redmond, 901 Halcyon Street, Nashville, Tennessee, which envelope, negatives, and prints, were mailed on April 1, 1964, and were delivered to the home of Mr. and Mrs. Redmond, 901 Halcyon Street, Nashville, Tennessee, and received by them from the mails, on or about April 4, 1964.

"4. The said photographs included a number of photographs of the defendant Dorothy Lucille Redmond which showed her bosom and vaginal area, along with closer and more detailed view of the vagina. Additionally, there were two photographs showing Mr. Redmond's genitals.

"5. The parties further stipulate that the actual photographs, which are in the possession of the United States Attorney, may be introduced and received into evidence without supporting testimony in the event the Court feels that the said photographs should be made a part of the record.

## "CONCLUSIONS OF LAW

"1. The developed photographs or pictures which were mailed to the defendants by 'Identification' from Havelock, North Carolina, in March 1964 constituted obscene, lewd and lascivious articles or things within the meaning of 18 U.S.C.A., Sec. 1461.

"2. The defendants upon the facts of the

present case knowingly caused the said photographs to be delivered through the mail according to the direction thereon, and consequently, they violated the terms and provisions of 18 U.S.C.A., Sec. 1461.

"3. The defendants upon the facts of the present case are guilty as charged in the one count information filed herein on October 15, 1964, and the Court accordingly so finds."

Affirmed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1056

WILLIAM HOYET REDMOND AND DOROTHY LUCILLE REDMOND, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, respectfully moves this Court for an order granting the petition for a writ of certiorari, vacating the judgment below, and remanding the cause to the United States District Court for the Middle District of Tennessee with directions to dismiss the information. The motion is brought pursuant to the power recognized by this Court in *Petite* v. *United States*, 361 U.S. 529,[1] and is made for the reason that the instant prosecution is not in accord with the policy of the federal government as indicated below.

[1] See also *Marakar* v. *United States*, 370 U.S. 723.



214-974—66

The pertinent circumstances which give rise to this motion are as follows. Some time in March 1964, petitioners, William Hoyet Redmond and his wife, took eleven photographs of each other posing in the nude. Thereafter, they sent the undeveloped film to a firm in Havelock, North Carolina, which had advertised its willingness to develop "confidential photographs" upon payment of a membership fee and a developing charge. The payments were made and in due course the developed negatives and a print of each were mailed back to petitioners.

Petitioners were charged with violating the postal obscenity law (18 U.S.C. 1461)[2] in that they know-

[2] 18 U.S.C. 1461 provides in pertinent part:

*Mailing obscene or crime-inciting matter.*

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;

* * * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

ingly caused eleven obscene photographs and negatives to be delivered to them through the mail. Petitioners waived indictment and jury and were tried on an information in the District Court for the Middle District of Tennessee on October 15, 1964. By judgment entered on November 6, 1964, both were found guilty. Mr. Redmond was sentenced to a term of nine months' imprisonment and Mrs. Redmond to a term of six months. The Court of Appeals for the Sixth Circuit affirmed.

The Department of Justice has a responsibility for the control of government litigation that is not confined to avoiding legal error but extends to the formulation and implementation of appropriate prosecutorial policies. In recognition of that responsibility, we have concluded that the initiation of the instant prosecution was not in accord with policies which had previously been formulated within the Department for the guidance of United States Attorneys. For that reason, and in the interest of justice, the information should be dismissed.

The policy of the Department was set forth in a memorandum to United States Attorneys, dated August 31, 1964. That memorandum concerns the handling of obscene private correspondence cases and makes the following points which are relevant here.

> 1. The primary objective of prosecution should be to restrain the exploitation of obscene private correspondence for commercial gain, such as, by the sale or solicitation of sale of obscene materials, or by the operation of a correspondence club for paying participants.

2. The principal thrust of prosecution should be directed toward those who are the prime movers in such endeavors.

3. It is the Department's view that generally no useful purpose is served by a felony conviction of individuals who have willingly exchanged private letters, although obscene. This is not to say that prosecution may never be instituted in such cases. Rather, it is our view that prosecution should be the exception confined to those cases involving repeated offenders or other circumstances which may fairly be characterized as aggravated.

4. United States Attorneys should give careful consideration to all of the surrounding circumstances, such as, the subject's prior record, particularly with respect to his involvement with obscene materials and sex-related offenses; his employment, including his opportunity for close association with young people; and his educational level.

5. The United States Attorney should determine initially whether a stern warning and declination of prosecution is adequate in the particular case. This disposition should suffice in the routine cases of consensual, obscene private correspondence.

While the organization which developed the Redmonds' film did sponsor some sort of correspondence club, there is no indication that the Redmonds engaged in any correspondence with other members. The mere return of the developed pictures to the Redmonds involves an even smaller degree of publication, if any, than does consensual correspondence. The Redmonds were not prime movers in the organiza-

tion. They were not repeated offenders. They had no record of involvement with obscene materials or sex-related offenses and no apparent opportunity for close association with young people. No other aggravating circumstance appears to be present. Finally, we note that this prosecution was not directed at "the sordid business of pandering" recently denounced by the Court in *Ginzburg* v. *United States,* No. 42, this Term.

Upon analysis of the relevant facts, we have concluded that this case does not present circumstances which would justify a departure from the government's policy. Accordingly, pursuant to the practice recognized in *Petite* v. *United States,* 361 U.S. 529, we move the petition for a writ of certiorari be granted, the judgment of the court below be vacated, and the cause remanded to the district court with directions to dismiss the information.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

APRIL 1966.

END